No. 25-1230

IN THE

Supreme Court of the United States

GOOGLE LLC,

Petitioner,

v.

VIRTAMOVE, CORP., ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF *AMICI CURIAE* 35 INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are academics who teach and write about intellectual property law and innovation at universities throughout the United States.[1] *Amici* believe that the petition for certiorari in this case presents significant and unresolved legal issues and that the perspective of legal scholars will aid the Court in considering this important question of federal law. *Amici* have no client or economic interest in the outcome of this case but have a personal and professional interest in the proper development of patent law and policy. A list of *amici* is attached as Appendix A.

SUMMARY OF ARGUMENT

The Court should grant certiorari because this case raises fundamental and exceptionally important questions of federal patent law that have not been, but should be, settled by this Court. Through their application of the "settled expectations" and summary denial policies, the Interim Director and Director of the U.S. Patent and Trademark Office (PTO) have exceeded their statutory authority and are substituting their personal animosity toward inter partes review (IPR) for the text of the Patent Act and congressional intent. The result has been to effectively

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[1] Parties' counsel and counsel for the PTO were given timely notice of *amici*'s intent to file this brief pursuant to Rule 37.2. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief.

abolish the IPR process, disregarding both the statute's text and this Court's decisions.

Congress expressly created the IPR process to review patent validity. This Court's review is necessary to ensure that the PTO does not continue to act outside its statutory authority and neuter the statute's mechanisms for weeding out weak patents.

In its decision below and others before it, the Federal Circuit has repeatedly declared it has no power to rein in the Director's misconduct. As a result, the Director's violations of the law will continue—unchecked—unless this Court steps in.

ARGUMENT

I. The PTO Has Disregarded the Patent Act to Invent a New Policy Insulating the Vast Majority of Patents from Any IPR Review.

In early 2025, interim PTO Director Coke Morgan Stewart began rejecting meritorious IPR petitions on the theory that the patent owner had developed "settled expectations" their patent wouldn't be challenged. *See, e.g.*, *iRhythm Techs., Inc. v. Welch Allyn, Inc.*, Nos. IPR2025-00363, -00374, -00376, -00377 & -00378, 2025 WL 1605274 (P.T.A.B. June 6, 2025). The basis? Simply that the patent was more than a few years old. As a result, nearly 70% of all patents—and an even larger percentage of litigated patents—are currently insulated from any review at the Patent Trial and Appeal Board (PTAB).[2]

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[2] Indeed, the impact goes beyond the PTAB; in at least one case an IPR on a patent was denied due to "settled expectations," only

During her tenure as Interim Director, Stewart issued around 300 denials retroactively applying her newly conjured rules, including 190 involving this "settled expectations" rationale. Adam Cook, Matthew Johnson & Daniel Sloan, *Discretionary Denial Statistics*, JD Supra (Oct. 16, 2025), https://perma.cc/7EKX-GJP6. The PTO's current Director John Squires, who took office in September 2025, is doing the same. During his tenure, he has denied 371 out of 498 petitions without reaching the merits. *See* Kathi Vidal, *PTAB Discretionary Denial Decisions Since 6/25/2025*, at 1 (2026), https://perma.cc/SRT9-JVQY.

To be fair, it is impossible to know exactly how many of the current Director's "discretionary denials" were based on the "settled expectations" policy because of another troubling fact: The Director has removed the Patent Trial and Appeal Board (PTAB) from the review process, usurping decision-making power for himself. *See* Dennis Crouch, *An Era of No: The PTO's New 0% Institution Rate*, Patently-O (Nov. 12, 2025), https://perma.cc/UPD4-D7MM. He has also stopped providing any reasoning for the vast majority of his discretionary denials. *Id.* Nonetheless, Director Squires has indicated that he considers the presence of "settled expectations" to be a relevant

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for reexamination to later be denied based on prior proceedings. *See Geotab Inc. v. Fractus, S.A.*, Nos. IPR2025-00928 & -00929, 2025 Pat. App. LEXIS 5219, at *2 (P.T.A.B. Sep. 12, 2025); Order Denying Request for *Ex Parte* Reexamination in Reexamination Control No. 90/015,984, at 2-3 ("Requester is the same challenger as in the prior *inter partes* review . . . . The current Request includes at least some of the same or substantially the same . . . arguments previously presented to the Office.").

factor. In the rare case where he has provided reasoning, he cites to earlier denials based on "settled expectations," including one concluding that "it is not an appropriate use of resources to review a patent in which a patent owner has developed settled expectations." *See Magnolia Med. Techs., Inc. v. Kurin, Inc.*, No. IPR2026-00097, 2026 WL 1348926, at *9 (P.T.A.B. May 14, 2026) (quoting *Dabico Airport Sols. Inc. v. AXA Power ApS,* No. IPR2025-00408, 2025 WL 1710080 (P.T.A.B. June 18, 2025).

The "settled expectations" policy does not rest on any proof that the patentee had previously asserted the patent or engaged in licensing negotiations—or even that the challenger was *aware* of the patent. *See, e.g.*, *Dabico*, 2025 WL 1710080, at *1. Indeed, the PTO will apply the policy even if the patentee hasn't argued or asked for it. *Id.* The mere fact a patent is a few years old means that the PTO is unlikely to permit any challenge, no matter how strong.

According to the PTO, six years is sufficient to "creat[e] strong settled expectations," *Kahoot! AS v. Interstellar, Inc.*, No. IPR2025-00696, 2025 WL 2176613 (P.T.A.B. July 31, 2025), but not necessary. Even a patent in force for as little as two years may have such expectations. *Amgen Inc. v. Bristol-Myers Squibb Co.*, Nos. IPR2025-00601, -00602 & -00603, 2025 WL 2086050 (P.T.A.B. July 24, 2025) (denying institution for patents that had been in force for six or more years, and allowing an IPR for a patent that issued in 2022 while noting that even such a young patent might have "settled expectations" based on "investment, time, and resources dedicated to research, development, trials, and regulatory approval").

II. The "Settled Expectations" Policy Makes PTAB Review of Most Patents (and the Most Important Patents) Impossible.

The vast majority of patents are older than six years (or younger than nine months[3]) and thus would not be subject to IPRs under even the narrowest reading of the Interim Director's new policy. *See* Mark A. Lemley & Jason Reinecke, *Our More-Than-Twenty-Year Patent Term*, 39 Berkeley Tech. L.J. 681, 682-83 (2024).

That is even more true of the patents for which IPR is most needed—those purchased and asserted by patent assertion entities (PAEs), or patent trolls. Empirical evidence shows that these parties overwhelmingly bring suit late in the patent's life—often in the final three years of a patent's term. Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309, 1312-13 (2013) (explaining that PAEs "begin asserting their patents relatively late in the patent term" and that "in the final years of patent protection, more than 80% of patent assertions are brought by patent-holding firms that have no intention of commercializing a product"). Because those patents have a different owner when they are asserted than they did when they were issued, there would be no reason for a challenger to bring an IPR action against them during the first few years of their life. But the Director has decided that a patent can lie dormant for years and still be subject to the new

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[3] IPR proceedings are barred during the first nine months of a patent's term. 35 U.S.C. § 311(c)(1).

"settled expectations" policy. *See Taiwan Semiconductor Mfg. Co. v. Advanced Integrated Cir. Process, LLC*, No. IPR2025-00682, 2025 WL 2369005, at *1 (P.T.A.B. Aug. 14, 2025).

The practical effect of the new policy has been dramatic. It has caused not only hundreds of discretionary denials but also changes to the way the PTAB itself evaluates cases. For IPR petitions filed since October 2024, around 72% have been denied, while IPR petitions filed between January and August of 2024 enjoyed a 61% institution rate. William A. Meunier et al., *The PTAB Pendulum Swings: How IPR Denials Are Reshaping Patent Owner and Challenger Strategies*, Mintz (Aug. 28, 2025), https://perma.cc/62K9-VL5X; *see* Dani Kass, *Squires' Institution Flips Are Increasing Uncertainty at PTAB*, Law360 (May 26, 2026), https://perma.cc/3TTP-E3BU ("Squires' overall institution rate is 25.9%, compared to a rate that ranged from 58% to 68% each fiscal year between 2021 and 2024.").

Not surprisingly, challengers have mostly stopped filing IPR petitions altogether, recognizing that it is a fruitless exercise because the Director has no intention of considering the merits. *See* Dennis Crouch, *Decimation: Ex Parte Reexamination Eclipses the IPR*, Patently-O (May 2, 2026), https://perma.cc/5ERP-NCAP. Before 2025, the PTAB received roughly 110 IPR petitions a month, a number that had held steady for years. By May 2026, that number dropped to 11. *Id.*

III. The "Settled Expectations" Policy Undermines Congress's Carefully Crafted IPR System.

The "settled expectations" policy flies in the face of the IPR regime's purpose. Congress created the IPR system to "remedy the[] sorts of problems" that arise when "bad patents slip through" the PTO. *See SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 360 (2018). The PTO, out of necessity, conducts only a somewhat cursory review of applications before issuing patents. Examination is ex parte, and examiners spend only eighteen hours on average on an application over a period of three years. *See* Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1499-1500 (2001). With more than 600,000 patent applications filed every year, it can't do more. And we don't need it to. Because the validity of most of those patents doesn't matter, the benefit of administrative revocation schemes like IPRs is precisely that they allow the PTO to concentrate its resources on the patents that matter—particularly those later asserted in litigation. *Id.*; Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 Berkeley Tech. L.J. 943, 967-68 (2004).

A patent owner should not have "settled expectations" that a patent they obtained only a few years before can never be challenged. The entire system is set up with the idea that if and when the patentee asserts the patent, its validity can be evaluated in detail. *See SAS*, 584 U.S. at 360 (explaining that to remedy the problem of bad patents' issuance, "Congress has long permitted parties to

challenge the validity of patent claims in federal court"). And while that remains theoretically possible in litigation, it is functionally out of reach for many would-be challengers. *See* Adam B. Jaffe & Josh Lerner, *Innovation and Its Discontents: How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do About It* 152 (2004) (discussing the various disadvantages challengers face when disputing the validity of a patent through litigation, including cost, an unfavorable standard of review, and the barring of certain arguments). Indeed, the IPR system was designed by Congress to provide a quicker and cheaper way to engage in that detailed evaluation. H.R. Rep. No. 112-98, at 48 (2011) (explaining that IPR was established to provide "quick and cost effective alternatives to litigation"). IPR has been a resounding success at that, delivering results that invalidate patents at a rate essentially identical to courts,[4] but doing so more quickly and at less than 10% of the cost of litigation. *See* AIPLA, 2025 *Report of the Economic Survey* (2026), https://perma.cc/J66G-EWQZ (comparing the median $3.62 million cost of litigation to the $350,000 cost of an IPR). The PTO's

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[4] Since the beginning of the IPR system, challengers have won in whole or in part 5,181 out of 11,511 completed proceedings, or 45.0%. If we exclude patents that are partially upheld (which is arguably a patent owner rather than a challenger win) challengers win 4,234 out of 10,564 cases, or 40.1%. Data calculated from law.lexmachina.com/ptab/ on September 20, 2025. Those numbers are essentially indistinguishable from the invalidity rate in court, which is 42.4%. John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1787 (2014) (finding 42.4% invalidity rates in cases decided 2009-2013).

new policy nullifies the very purpose of the IPR regime.

IV. The "Settled Expectations" Policy Cannot Be Squared with the Statutory Scheme.

The PTO's new "settled expectations" policy is wholly inconsistent with the America Invents Act (AIA). Congress knew how to write time limits into the IPR system. It did so twice. First, it precluded filing an IPR in the first nine months after a patent issues. 35 U.S.C. § 311(c)(1).[5] Second, it precluded filing an IPR if the patentee waited "more than 1 year after the date on which the petitioner . . . is served with a complaint alleging infringement of the patent." 35 U.S.C. § 315(b). Those statutes do not contain any other time limits, and they do not leave room for the PTO to create an entirely new time limit of its own—particularly one that eliminates the overwhelming majority of petitions the statute permits. *Cf. SAS*, 584 U.S. at 365 ("[I]f Congress wanted to adopt the Director's approach it knew exactly how to do so. . . . And its choice to try something new must be given effect rather than disregarded in favor of the comfort of what came before.").

The Court's rationale for rejecting the analogous doctrine of laches in patent litigation is instructive:

> Laches provides a shield against untimely claims, and statutes of limitations serve a similar function. When Congress enacts a statute of limitations, it speaks directly to the

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[5] Notably, that provision, which *requires* the petitioner to delay filing, seems inconsistent with a policy that any delay in filing is improper.

> issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief. The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted. . . . As we stressed in *Petrella*, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit."

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 580 U.S. 328, 334-35 (2017). There is no reason to give the PTO more power than courts, particularly when, to show settled expectations, none of the equitable factors that would support laches or estoppel are even required.

The Federal Circuit has relied on the statutory provision that makes the PTO's institution decisions "final and nonappealable" in refusing to evaluate the Director's conduct. *See, e.g.*, *In re Cambridge Indus. USA Inc.*, No. 2026-101, 2025 WL 356129, at *2 (Fed. Cir. Dec. 9, 2025) (quoting 35 U.S.C. § 314(d)). But Congress did not have in mind the risk that a PTO director would go rogue—like the recent Director and Interim Director have done—and decide to wholly ignore the statutory scheme.

In refusing to even consider the vast majority of IPR petitions, the PTO is not legitimately exercising the case-by-case discretion the statute grants to the Director. 35 U.S.C. § 314(a). Rather, it is effectively abolishing the IPR process. This is not the exercise of the Director's statutory discretion to consider the

merits of each case. It is instead the calculated decision *not* to consider the merits. *Cf. Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005) ("Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike."). By displacing congressionally enacted policies with its own preferences, the PTO has made IPR outright inaccessible in a substantial majority of cases.

This Court has kept a safety valve in place for precisely this kind of dereliction of duty. *See SAS*, 584 U.S. at 371 (allowing judicial review of institution decisions under the Administrative Procedure Act and to challenge "shenanigans"); *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 275 (2016).

The PTO's current policy does not reflect a case-by-case exercise of discretion on the facts of each case. Rather, it reveals the Office's opposition to the very idea of IPRs. Then-Interim Director Stewart said in a speech to the Intellectual Property Owners Association:

> Imagine if your law license, your business license, your college degree, the title to your home or your ability to drive were constantly subjected to reconsideration by anyone at any time, year after year after year. And that you had no presumption that the original decision was correct, and no window of time that closes to stop these challenges. It's hard to think of a single example in all of government where such a system exists. And *such a system is completely contrary to the exclusive right granted to patent owners in the Constitution,*

> *the presumption of validity granted by Congress and the Article III court protections afforded to patent owners prior to the AIA . . . .*
>
> To have a stable economy we need a stable patent system. Repeated and expedited reconsideration of patent grants under the low preponderance of evidence standard is the antithesis of stability.

Melissa Ritti, *Acting PTO Director Talks Settled Expectations, End of Remote Work, and More*, MLex (Sep. 8, 2025), https://perma.cc/G4LB-T9B3 (emphasis added). That statement reflects a flat-out rejection of the entire policy of IPRs as established by Congress in the America Invents Act.

Director Squires has continued—and indeed amplified—that hostility toward the statutory scheme. *See generally* Paul R. Gugliuzza, *Our New Old Patent System*, 106 B.U. L. Rev. (forthcoming 2026) (manuscript at 4), https://perma.cc/9A88-89SN (noting that Director Squires "seems eager to undermine, if not dismantle, the PTO's post-issuance review proceedings" and that this "threaten[s] to recreate a version of the patent system Congress [has] deliberately sought to reform"). He has testified that he believes "IPR is not the only game in town" and that he "prefer[s] a more laid open model where you take your shot, take it now, and take it once and for all." House Judiciary GOP, *Oversight of the U.S. Patent and Trademark Office*, at 1:45:15 (YouTube, Mar. 25, 2026), https://perma.cc/9R9F-86HC (to locate, select "View the live page"). In *Magnolia Medical Technologies*, Squires advanced his view that the purpose of IPRs is "to provide a quick and cost-effective *alternative* to district court patent litigation,"

and explained that his approach was motivated by a belief that "many petitioners seek AIA review in parallel with litigation to gain litigation advantage." 2026 WL 1348926, at *1 (emphasis in original).

That hostility is reflected not only in the "settled expectations" cases. The Director also has proposed a rule change that would refuse IPR petitions unless the challenger agreed to waive its validity challenges in litigation—even challenges it couldn't bring in an IPR. Jason Engel & Erik Halverson, *USPTO Proposes Rule Changes to Refocus Inter Partes Review Proceedings*, K&L Gates IP Law Watch (Oct. 17, 2025), https://perma.cc/T8B4-FXXL. That proposed rule is flatly inconsistent with the statute, 35 U.S.C. § 315(e), which sets out a much narrower scope of impermissible overlap, and with the cases interpreting that statute, *see, e.g.*, *Ingenico Inc. v. IoEngine, LLC*, 136 F.4th 1354, 1365-66 (Fed. Cir. 2025).

Further, Director Squires has refused to institute meritorious petitions—ones that the PTAB judges and even his own deputy found worthy of review—because while some claims were likely invalid, other claims in the patent might not be. *See, e.g.*, *Zhuhai CosMX Battery Co. v. Ningde Amperex Tech. Ltd.*, No. IPR2025-00405, 2025 WL 2939499 (P.T.A.B. Oct. 15, 2025). That, too, directly contradicts the statute, which provides for review if at least one of the claims of the patent is likely invalid. 35 U.S.C. § 314(a). It also undermines this Court's reading of the statute, which "suggests . . . a regime where a reasonable prospect of success on a single claim justifies review of them all." *SAS*, 584 U.S. at 358. And the Director has done all this retroactively, not by proposing rules but instead by applying these new *fiat* doctrines to

petitions filed before he even took office—petitions filed under very different rules. *See* Mark A. Lemley, *Patent Law's (Short-Lived?) Era of Normalcy*, 103 Wash. U. L. Rev. 1619, 1640-41 (2026).

The evidence is clear: The Director doesn't think we should have an IPR system, at least not one that allows defendants in patent lawsuits to opt for a quicker and cheaper resolution at the PTO. But Congress clearly contemplated such a parallel system and built a statute of limitations and estoppel rules precisely to govern the coordination of litigation and IPR proceedings. *See* 35 U.S.C. § 311(c)(1) (permitting proceedings to be filed "later [than] 9 months after the grant of a patent"); *id.* § 315 (titled "Relation to other proceedings or actions"); *id.* § 315(b) (providing that IPRs may be filed by a defendant in litigation within one year after the suit is filed); *id.* § 315(e) (providing for limited estoppel in court based on IPR findings in co-pending litigation). Thus, not only are the Director's motivations misguided, but they also cannot be squared with the system Congress created. *See* Christian Helmers & Brian J. Love, *Patent Validity and Litigation: Evidence from U.S. Inter Partes Review*, 66 J.L. & Econ. 53, 78 (2023) ("While the availability of both litigation and the IPR process has been attacked . . . as inefficient and opportunistic, our results confirm that IPRs can have a complementary effect on litigation, as Congress hoped at the time of the IPR system's creation.").

This Court has carefully considered the legality, scope, and limits of that IPR system in no fewer than six cases over the past decade. *See Cuozzo*, 579 U.S. at 261; *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325 (2018); *SAS*, 584 U.S. at 357;

Return Mail, Inc. v. U.S. Postal Serv., 587 U.S. 618 (2019); *Thryv, Inc. v. Click-to-Call Techs., LP*, 590 U.S. 45, 53 (2020); *United States v. Arthrex, Inc.*, 594 U.S. 1, 8 (2021). It presumably did so because it thought the congressional scheme mattered, not simply to issue advisory opinions the Director was free to disregard.

The Director may well believe IPRs are a bad idea. It is fine for someone—even someone in a position of authority—to disagree with Congress's judgment and wish the law had been written differently. It is not fine for them to seek to supplant congressional mandate by adopting their own policy, as the Interim Director and Director have done. This is "shenanigans" indeed. *SAS*, 584 U.S. at 371.

V. This Issue Is Important and Recurring, and Certiorari Is the Only Way to Ensure That the PTO Follows the Law.

The PTO's disregard for the Patent Act and Congress's intent in enacting the AIA raises exceptionally important questions of federal law that should be settled by this Court. The PTO has issued hundreds of discretionary denials pursuant to an illegal policy. The Court of Appeals for the Federal Circuit has refused to review the PTO's actions, deciding in over a dozen cases that these decisions are "final and nonappealable." *See, e.g.*, *In re Cambridge Indus. USA Inc.*, No. 2026-101, 2025 WL 356129, at *2 (Fed. Cir. Dec. 9, 2025) (cleaned up); *In re Sandisk Techs., Inc.,* No. 2025-152, 2025 WL 3526507 (Fed. Cir. Dec. 9, 2025). This splits with the D.C. Circuit, which has held that federal courts have jurisdiction to review agency positions that are not "single-shot" decisions, but rather represent statements of a "*general enforcement policy*," even if the statute

precludes review of individual agency decisions. *See OSG Bulk Ships, Inc v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (cleaned up).

The PTO's actions and the Federal Circuit's refusal to rein it in reach "well beyond [any individual] decision to institute inter partes review," *Thryv*, 590 U.S. at 53—they implicate whether the statute Congress created to review and help weed out "bad patents" continues to functionally exist at all. Certiorari is the only available mechanism to resolve this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—LIST OF *AMICI CURIAE*

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